United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Atchison, Topeka & Santa Fe Railroad Company, a corporation, *Plaintiff in Error,* vs. A. H. Nelson, *Defendant in Error.*	2406

BRIEF OF DEFENDANT IN ERROR.

Filed
OCT 3 - 1914
F. D. Monckton,
Clerk.

GRAY, BARKER & BOWEN,
By WHEATON A. GRAY,
Attorneys for Defendant in Error.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Atchison, Topeka & Santa Fe Railroad Company, a corporation,	
	Plaintiff in Error,
	vs.
A. H. Nelson,	
	Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The only question in this case arises as to the admissibility of the judgment roll of the case previously instituted by the plaintiff and his wife in the case at bar.

ARGUMENT.

For the purposes of the argument in this case, we may concede that counsel for plaintiff is correct in the position taken in his brief that "the judgment in the former case has only the same effect as evidence in this case which that judgment would have had had it been rendered by a court of California."

Assuming the truth of that statement to determine what a court of California would do with reference to the previous judgment pleaded and introduced in evidence in the case at bar, we should look not only to the statute quoted in defendant's brief, but we should look also to see what construction the California courts have placed upon those sections of the Code of Civil Procedure. In other words, we should look to see what they have done with the section and under the sections of the Code of Civil Procedure, cited, in the past to determine what they would do in the case before us. The sections of the Code applicable to the matter read as follows:

> "Sec. 1908. The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:
>
> "1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.
>
> "2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive *between the parties* and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or con-

structive, of the pendency of the action or proceeding."

"Sec. 1909. Other judicial orders of a court or judge of this state, or of the United States, create a disputable presumption, according to the matter directly determined, between the *same parties* and their representatives or successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity."

"Sec. 1910. The parties are deemed to be *the same* when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either."

The Supreme Court of this state has held repeatedly that the above and foregoing three sections are but the declaration of an old common law rule governing the effect of judgments, and in view of that holding, we stoutly contend that it is immaterial whether we measure the effect of this previous judgment by what the courts of this state would do with it or by what the courts generally, following the rules of the common law throughout the United States, would do with it.

This is so because it has been declared, as we shall presently see, that the common law prevails in this state with reference to this doctrine of *res adjudicata,* and that the provisions of our Code of Civil Procedure are nothing more or less than a declaration of those common law doctrines.

In the case of

Ferrea v. Chabot, 63 Cal. 564,

after citing and quoting the three sections of the Code, 1908, 1909 and 1910, hereinabove set forth, the Supreme Court of California, speaking through Mr. Justice McKee, and concurred in by Justices Ross and McKinstry, say as follows:

> "These sections of the Code are merely declaratory of the common law rule that the judgment of a court of competent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court."

In the Ferrea case "nominally the parties to the two suits were not the same," but the court goes on to discuss the question whether, within the common law rule which governed the case, by reason of its having been adopted and incorporated into the statute, the former judgment was binding on a party who was not in fact a party to the record, by reason of his interest in the controversy and the notice that he had received of the pendency of the suit, the court finally conceding that under the authorities cited, one being the case of Miner v. Clark, 15 Wend. 125, that so far as the question of parties was concerned in the case, the relation of the party not named in the suit at all was such to the case as to bind him by the judgment and that he was concluded from questioning the matter determined therein; at the same time, the court holding that for the reason that the same contracts were not involved in the several suits the former judgment was not *res adjudicata* in the later case. The decision deals almost exclusively

with the question of *res adjudicata,* and in it the court cites the cases of Davis v. Brown, 94 U. S. 423, and Russell v. Place, 94 U. S. 606, which illustrate and show that the doctrine of *res adjudicata* as laid down in this state by its supreme tribunal are the same as those announced by the federal courts as being derived from the doctrines of the common law.

We next cite to the court the case of

Lamb v. Wahlenmaier, 144 Cal. 91.

This was an action brought upon a contractor's bond against the contractor and his surety to recover the amount paid by the plaintiff in discharge of liens in excess of the contract price for constructing the building. The defendants in the case pleaded the judgment in a previous action brought alone by Wahlenmaier against Lamb to recover under their contract in which the same questions were litigated, as in the case of Lamb v. Wahlenmaier, and his surety, but as clearly appears, the surety was not a nominal party to the former suit. We quote from the opinion in the Lamb case:

> "The defendants herein have pleaded the judgment in that action in bar of the plaintiff's right of recovery. The Superior Court held that it was a bar in favor of Wahlenmaier, but not in favor of the surety company, and rendered judgment against the latter and in favor of the plaintiff for $691. The surety company has appealed.
>
> "The rule formulated by Lord Chief Justice De Grey in the Duchess of Kingston's case, and frequently repeated in other cases, that 'The judgment of a court of concurrent jurisdiction directly

upon a point is, as a plea, a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court,' has been substantially reproduced in section 1908 (subd. 2) of the Code of Civil Procedure of this state. The estoppel thus created is not limited to an action which is identical in form with the former action, or where the same parties are plaintiff and defendant in each of the actions, but may be invoked whenever, in the second action, the parties are in privity with the parties to the first action and the same issue is presented for determination which was determined in the former action. As between the parties to the action, the judgment therein is an estoppel as to all matters which are actually and necessarily included in the judgment. (Code Civ. Proc., Sec. 1911.)"

It will be seen that the court in the above quotation construes the word "parties," as used in the statute, to mean not only the nominal parties to the record, but also to include all parties who are in privity with the nominal parties to the first action, and while the surety was not a party to the first action in name at all, he was in privity with one of the parties to that action, and therefore bound by it, and the judgment therein was *res adjudicata* as to him, as well as to the nominal parties. It was plain in the above case that judgment could not have gone either for or against the surety in the first case, because he was not a party to that suit, and if section 1910 had been given by the Supreme Court of this state the narrow construction which counsel for plaintiff in error seeks to give it, in his brief, the case of Lamb v. Wahlenmaier would have

been decided the other way. The force and effect of the decision in the Lamb case is that the parties in both cases were substantially the same because an actual party to the suit represented the interest of his surety in the former action, and anything that bound the principal by reason of the privity between the principal and the surety, also bound the surety, and was *res adjudicata* both as to the principal and as to the surety. The Duchess of Kingston's case, and the rule declared therein was unquestionably the common law rule governing the proposition of *res adjudicata,* and when the court says that the rule therein laid down "has been substantially reproduced in section 1908 (subd. 2) of the Code of Civil Procedure of this state," it means to say that the common law rule has been enacted into the statutes of this state.

We next call the court's attention to the case of Cook v. Rice, 91 Cal. 664,

in which it was held, quoting from the head-note:

> "In an action against a husband and wife to recover damages for an alleged trespass upon public land in the possession of the plaintiff, claiming as a pre-emptioner and to enjoin future trespasses, where the answer of the defendants alleged that the wife claimed no interest in the land, and that her acts were those of a member of the family of the husband, and in privity with his title, it is proper to admit in evidence on behalf of the defendants the judgment roll in a former action of ejectment by the plaintiff against the husband, wherein it was adjudged that the plaintiff was entitled to the possession only of a small inclosure

> of ten acres not trespassed upon by the defendants, and that the plaintiff was not possessed or entitled to the possession of any part of the land entered upon by the defendants, the two actions being substantially between the same parties."

It will be seen, if not from this head-note, from an examination of the case, that the wife was not a party named at all to the first action. The same objection, in substance, was made in the case that is made here, to-wit, that the wife was not a party to the first action (here it is that she is not a party to the second action), and therefore a judgment could not have been rendered therein, either for or against her, and therefore she was not bound by the judgment under the provisions of our code, which has been in effect ever since 1872 just as it now exists. The opinion in the Cook v. Rice case was written by Judge Temple, then acting as commissioner in 1891. We quote further from his opinion as follows:

> "2. It was objected that it was not between the same parties. Substantially, it was between the same parties. Mrs. Rice made no claim to the land, and all she did was under the claim of her husband. Had she, by her acts, taken possession, the right, if any, thus acquired would have been common property, and the right to control and manage in her husband."

Thus we see that the doctrine of privity is kept in view in the determination of this case. The wife was in privity with the husband by reason of their community interest in the property. It was community property. Therefore, though she was not a party to

the first action at all, literally speaking, yet she was a party by reason of her privity with her husband and therefore the judgment could be used as evidence in her favor or as an estoppel against any party to the record, either nominal or by privity. Judge Temple in the case last cited, puts his statement that the parties were substantially the same squarely upon the ground that the property in controversy in both suits was common or community property of the husband and wife.

In the case at bar, in both the suits, the recovery, as has been held by our Supreme Court in numerous cases, is community property. In the first suit the wife recovered for the pain and inconvenience she suffered by reason of her personal injuries and the proceeds of that kind of a suit are held to be community property in the following cases:

McFadden v. Santa Ana R. Co., 87 Cal. 464;
Lamb v. Harbaugh, 105 Cal. 680.

The McFadden case was an action for damages alleged to have been sustained by a personal injury to the wife alone, through the negligence of the defendant. The husband was joined with the wife as a plaintiff in the action. We quote from the opinion as follows:

> "The right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action (Chicago etc. R. R. Co. v. Dunn, 52 Ill. 260, 4 Am. Rep. 606; Anderson's Law Dict.); and if this right to damages is acquired by the wife during marriage, it, like the damages when re-

covered in money, is, in this state, community property of the husband and wife (Civ. Code, Secs. 162-164, 169), of which the husband has the management, control, and absolute power of disposition other than testamentary."

We also quote from the opinion of the court in bank delivered by Mr. Justice Harrison in the Lamb v. Harbaugh case, cited above:

"Whatever may be the law in other states, in this state the separate property of the wife which is acquired by her after marriage is limited to such as she acquires by gift, bequest, devise and descent. If a right of action for damages for a personal injury is not acquired by either of these modes it is a part of the 'other property acquired after marriage' and is therefore community property."

The case of

Martin v. S. P. Co., 130 Cal. 285,

was a suit by the plaintiff for loss of services of his wife and it was alleged in the complaint in the action as follows:

"That by reason of the negligence of the defendant the injuries received by plaintiff's wife were permanent and rendered her wholly unable to perform her usual work and duties, and that by reason thereof he has been, and will be, through the remainder of her life, deprived of her services and compelled to provide medical aid and care for her. Judgment was rendered in favor of the plaintiff."

We quote further from the opinion of the court:

"The right of the plaintiff to maintain the action does not depend upon the right of the husband to

compel the wife to render such services or upon the existence of any obligation upon her part to perform them, other than the obligation of mutual support which they contract toward each other (Civ. Code, Sec. 155). The action is brought to recover compensation for the damages sustained by the wrongful act of the defendant whereby the plaintiff has been deprived of her services and compelled to expend money as a consequence of such deprivation. The services of the wife are a part of the earning power of the community, and the earnings received for her services constitute community property as much as do the earnings received for the services of the husband. If the injury had been received by the husband it would not have been contended that he could not recover for the damage sustained by the loss of his earning capacity. In her case the earnings would be community property, and any act by which either husband or wife is deprived of the capacity to render services, diminishes the capacity to accumulate community property. * * * The husband as the head of the community has the right to maintain actions for damage to property sustained by the community."

It is clear, therefore, that in the action at bar though the wife is not a party to it, she has her community interest in the recovery and while she is not a nominal party, she is, by reason of her privity with her husband, by reason of her interest in the community property to be recovered, an actual party to the suit, or, as is said by Judge Temple in a case previously decided, the parties in this last suit are substantially the same as they were in the first suit, by reason of the fact that community

property is and was involved in both of these actions; and the fact that the law requires that both the husband and wife shall be parties to the former action, and only the husband shall be plaintiff in the last action brought to recover for loss of services, in no way affects the substantial results of the litigation. It is a mere artificial requirement in procedure, the judgments in both instances having the same affect upon identically the same parties, and identically the same interests. The courts of this state look past the nominal parties and see only the parties in interest.

The case of

Lindsey v. Danville, 46 Vt. 144,

is an action for loss of services and expense of medical attendance on a wife, and is exactly on all fours with the case at bar, not only as to the facts involved, but also as to the law of *res adjudicata* therein laid down. We therefore quote the opinion in the case in full:

> "The opinion of the court was delivered by Redfield, J. The plaintiff and wife, in a joint action, had recovered final judgment against the defendant town, for personal injury to the wife, by reason of the insufficiency of the highway which it was incumbent on the defendant to keep in repair. This suit is brought to recover damages that accrued to the husband by reason of the same occurrence. The same facts must be proved in this case, as in the former, to warrant a recovery by this plaintiff. The sufficiency of the highway, the care and prudence of the plaintiff's wife in the management of the team, the condition and safety of the wagon and tackle, are in issue in this case

precisely as in that. The defendant has had full opportunity to adduce evidence, and cross-examine the plaintiff's witnesses, upon these issues, which have been adjudicated. Is the defendant concluded, as to these issues, by the former judgment? The identity of the issues and subject-matter of the two suits, is not questioned. Nor is it denied that facts once judicially determined between the same parties, are concluded. In the language of Lord Ellenborough, in the leading case of Outram v. Morewood *et ux.*, 3 East 346: 'The estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them.' In that case the defendant's wife, Ellen, had been sued for digging coals in the plaintiff's mine; the wife had justified her acts, under a claim of right in the coal mine, which had been determined against her. She afterwards intermarried with the defendant Morewood, and continued to dig and remove the coal from plaintiff's mine; and the plaintiff brought a second suit against husband and wife, who attempted to set up the same right and title, as in the former suit, and the court held that both defendants were estopped. The case was elaborately argued by Erskine on the one side, and by Gibbs on the other, and the chief justice brought to his service his great learning and judicial vigor, in a thorough analysis of all the authorities on the subject of estoppel, and seems to have had no doubt, that if the wife was estopped by the former judgment against her, the husband would be estopped also.

"The case of Incledon *et al.* v. Burgess, reported in 1 Show. 27, was an action of trespass for breaking a close. Plea, a prescriptive right of common of turbary, etc.; replication, traversing such prescription. Rejoinder, by way of estoppel, was, that in such a term, one of the plaintiffs brought an action of trespass against the defendant, wherein he pleaded the same prescription, and issue tried upon it, and found for the defendant. The question was made in argument, that the estoppel should not prevail, because another plaintiff was joined in the former suit. Lord Holt, who gave the opinion of the court, is reported to have said: 'An estoppel upon a verdict goes a great way; but if one man is estopped, and he joins another with him, whether this shall avoid the estoppel, is a quere.' But his lordship gave no opinion upon the estoppel; but disposed of the case upon a defect in the declaration. The averment in the declaration was, *'Contra pacem domini regis';* and the court held that the averment should have been 'against the peace of both kings'; it being in the reign of William and Mary. Lord Ellenborough reviews the authorities cited by Lord Holt, and somewhat criticises his disposition of the case on such technicality, and avoiding the merits of the plea. He evidently thought the estoppel should have prevailed. In Outram v. Morewood, the court say:

" 'If the wife were bound by this finding, as an estoppel, and precluded from averring the contrary of what was then found, the husband, in respect of his privity, either in estate or in law, would be equally bound.' 2 Smith Lead. Cas. 662-822. Hawkins v. Lambert, 18 B. Mon. 99. But in this case the husband and wife had impleaded the de-

fendant in a joint action, and recovered. Had the defendant town recovered final judgment in the first suit, against both plaintiff and his wife, and then the plaintiff should have instituted this suit, and sought to try precisely the same issues in which he had been once cast, would the defendant have deemed it a duty to marshall the same evidence in defense, and try again the same issues that had been once finally determined? If the husband would be concluded by an adjudication against the wife, in which he had no part, a *fortiori* he would be concluded by a judgment to which he was party, and had full opportunity to adduce evidence, and cross-examine the witnesses of his adversary. In the case of Spencer *et al.* v. Dearth, 43 Vt. 98, the court held that an award between the payee and surety of a note, in which the note was adjudged to be paid, was conclusive in a suit between the payee and the principal in the note; though it was conceded that, had the judgment been the other way, the principal would not have been concluded. Ordinarily, estoppel must be mutual, and conclude both parties, and that case was held an exception. But in this case there is no want of mutuality, and both parties would be alike concluded. We find no error in this branch of this case."

The above case, as will be observed from the citations contained in it, is based and founded on the common law doctrine of *res adjudicata,* and inasmuch as it has been declared over and over again by the Supreme Court of the state of California, as we have already seen, that the three sections of our Civil Code of Procedure, quoted in the briefs in this case, are but

a declaration of the common law rule, the above case should be regarded as an announcement of the law, as it is, and should be recognized and enforced in the courts of the state of California, including the federal courts of this state.

As further proof that the courts of this state have recognized the common law rule as being the rule of action in this state, we quote from the head-note of the case of

Reed v. Cross, 116 Cal. 473.

"A judgment or decree necessarily affirming the existence of any fact, is conclusive upon the parties, or their privies, whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal, or other proceeding provided for its revision."

We quote also from the opinion of the court in bank, written by Mr. Justice Harrison, in the case of

Wolverton v. Baker, 98 Cal. 632.

"The plea of *res judicata,* applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

A very good statement of the common law rule applicable to this case may be found in the opinion by Mr. Justice Harlan in the case of

S. P. R. Co. v. U. S., 168 U. S. at page 48,

from which we quote:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so declared, must, as between the same parties, or their privies, be taken as conclusively estopped so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if as between parties and their privies conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

See also upon this same subject:

New Orleans v. City Bank, 167 U. S. 371;
Freeman v. Barnum, 131 Cal. 386;
Nickerson v. Cal., 10 Cal. 520;
Bingham v. Kerney, 136 Cal. 175.

While it was necessary under our practice, to begin two separate actions for the injuries complained of (see Tell v. Gibson, 66 Cal. 246), yet not only do all of the authorities above cited to that proposition show that the subject of the action in both cases was community property, in which both the husband and wife had an interest, but the statute of this state itself declares the amount recovered in both of these cases to be community property.

Section 172 of the California Civil Code provides:

> "The husband has the management and control of the community property with a like absolute power of disposition, other than testamentary, as he has of his separate estate."

Section 162 of the California Civil Code provides:

> "All property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent with the rents, issues and profits thereof, is her separate property."

The next section defines the separate property of the husband in almost the exact language of section 162, and following that, section 164 of the California Civil Code provides:

> "All other property acquired after marriage by either husband or wife, or both, is community property."

And, as has been held by the decisions of the Supreme Court of this state, already hereinbefore cited, the recovery in personal injury suits by husband or wife, or by both, after marriage, is community property under the provisions of these sections.

Authorities Cited by Plaintiff in Error.

In plaintiff's brief there is but one case cited which seems at all applicable to the question here involved. That is the case of Lindsey v. O. S. L. R. Co., 90 Pac. 984, an Idaho case. The court in that state seems to be composed of three judges, only two of which concur in the opinion. An examination of the opinion, so far as it relates to the subject of *res adjudicata,* discloses that the question is not very thoroughly considered. No authority whatever is cited in support of the decision, and while it appears from the decision that the recovery had by a wife in the state of ~~Oregon~~ Idaho for the pain and injury she suffered is, under the law of that state, community property, it does not appear from the opinion whether the recovery by the husband for loss of services would be treated as community property or not. As to what the rule is as to this last proposition, in Idaho, we are left in the dark, but whatever it may be, the case is at all events at right angles with the decision of the court in this state, as announced by Judge Temple in the case of Cook v. Rice, 91 Cal. 664, and also in other California cases hereinabove cited. It is also at right angles with the common law rule laid down in the Vermont case, hereinabove quoted, which common law rule has been declared in this state by its supreme tribunal over and over again to be the true statutory rule in this state.

As to the cases cited by plaintiff of

Walker v. City, 45 Atl. 657,

a Pennsylvania case, and

Womach v. City, 100 S. W. 443,

a Missouri case, it appears in both of those cases that under the law of both of those states, Pennsylvania and Missouri, recovery for the personal injuries of the wife is the separate property of the wife in the one instance, and in the other, where the recovery is by the husband for the loss of her services, the recovery is the separate property of the husband.

We quote from the opinion in the Walker case, which is a Pennsylvania case:

> "The right of the wife in the first action being for a tort done to her was her separate property by the express words of the Act of June 3, 1887."

We quote from the opinion in the Womach case, as follows:

> "The term privity means mutual or successive relationship to the same rights of property."

And again:

> "In the present condition of our statutory law, the ownership of the proceeds of a judgment in favor of the wife no longer remains as at common law. There such damages belonged to the husband when recovered by judgment in a joint action with his wife. But in our day they belong to the wife alone, so runs the written law. R. S. 1899, Sec. 4340, which provides that * * * 'Any personal property including rights in action belonging to any woman * * * or has grown out

> of any violation of her personal rights shall, together with all income, increase and profits thereof, be and remain her separate property and under her sole control and shall not be liable to be taken by any process of law for the debts of her husband.' That section also provides that she may sue in her own name without joining her husband."

In both of these cases, the Pennsylvania and the Missouri case as well, it is pointed out that the husband was not a necessary party to the first action, but the real ground and reason for the decision is that the husband had no interest in the results of the first action, and therefore there was no privity of interest between the husband and wife in the action; but in this state, as well after the rule was changed by the amendment of 1913, permitting the wife to bring an action with or without her husband for her own pain and suffering, as also before that amendment, there was, and still is, a privity of ownership between the husband and wife in the recovery for the wife's pain and suffering, as well as for the loss of her services, because the statute defining separate and community property was not amended at any time since the decisions of the Supreme Court hereinabove cited.

In an endeavor to have the statutes of this state construed narrowly and according to their letter rather than liberally, and in accordance with their substance and effect, counsel for plaintiff calls particular attention to section 1910 of our Code of Civil Procedure, and the words "between them alone" and would construe those words to mean as applied to this case that

because a judgment in the original suit could not have been rendered against the husband alone, but must have been a joint judgment in favor of the wife and husband together, therefore the statute precludes the introduction of such judgment here in evidence. As was well said in the court below by Judge Wellborn upon the argument of the demurrer to the supplemental complaint, the statute on its face will bear no such construction. The reasons given by the learned trial judge for the statement of this view are substantially as follows, as the author of this brief remembers them:

It will be noted that in section 1908 of the Code of Civil Procedure, quoted near the beginning of this brief, the language is "in other cases the judgment or order is in respect to the matter directly adjudicated, conclusive *between the parties.*" Note the expression *"the parties."* In section 1909 the language of the section is "other jurisdictional orders of the court or judge of this state, or of the United States, create a disputable presumption according to the matter directly determined between *the same parties.*" Note the expression in this section *"the same parties,"* and compare it with the expression "the parties" in the preceding section. Now comes section 1910, following immediately upon section 1909, in which the language is "the parties are deemed to be the same," etc. The expression "the same," used in 1910, is confined to 1909, and is not found in section 1908 at all, so the learned judge in the court below said, that under the most literal construction of the law, section 1910 did not mean to qualify or define the expression "the

parties," contained in section 1908, but it did mean to qualify only the expression "the same parties," contained in 1909. Arguing that if it had intended to qualify "the parties," leaving out the word "same," it would have used the same or similar expression contained in section 1908, so therefore, if counsel desires to be literal in his construction, this construction, placed upon the statute by the learned judge of the court below, literal though it be, removes from under his feet the only ground upon which he attempts to stand, to-wit, the literal construction of the statute. The writer of this brief deems the theory enunciated as to the construction of the statutes by the learned judge of the court below, to be perfectly sound and reasonable, and for that reason incorporates it here.

Another thing we would suggest: What does the expression "between them alone" mean? Is it singular in its nature or is it plural? The word "them" would seem to be plural; the word "alone" would seem to be singular. The two words taken together, "them alone" would seem to be plural. How many is included then in the plural expression? Does it mean to include two parties, or does it mean to include three parties or four parties? Does it, as applied to the case in hand, by its literal interpretation, mean to say that in the former suit, in order to make it available in the later suit, the court must have had the power in such former suit to render a several judgment in favor of the husband alone and against the defendant, or does it mean in order to make the former judgment available in the second case that all that was necessary was

for the court to have been able to pronounce judgment in that case in favor of both the plaintiffs and against the defendant? From the words which follow the word "alone" it would seem that this latter theory is the case, because the statute says: "Though other parties were joined with both or either." If at first blush this word "alone" is to stand by itself unqualified, and if it signifies the singular and not the plural, if it shall be taken to mean, standing alone, that the judgment in the former case must have been in favor of the husband alone, in order to be available in the second case, still there is a section of the same code in which this section is found which qualifies and extends its meaning "for the purpose of promoting justice," if we find it necessary to resort to that section. We allude to section 17 of the Code of Civil Procedure of the state of California, which provides that:

> "Words used in this code in the present tense include the future as well as the present. * * * The singular includes the plural and the plural the singular."

We submit that in the numerous decisions of the Supreme Court of the state of California that we have cited, showing that these three sections of our Code of Civil Procedure only announce the common law doctrine that judgments are binding not only upon the nominal parties, but on all parties in privity with the nominal parties, in each and all of these decisions of our Supreme Court they have necessarily construed this section 1910 as applicable only to the provisions of 1909, and not at all applicable or in any way qualifying

the provisions of 1908, contained in the second subdivision thereof. The Supreme Court has so decided because the word "alone" and its relation and position in section 1910, and the relation which it bears to section 1909, and 1908, warrants the same construction placed upon it by the learned judge of the lower court.

We respectfully submit that the judgment of the court below should be affirmed, because the plaintiffs, being in privity in both cases, are substantially the same in both cases.

GRAY, BARKER & BOWEN,
By WHEATON A. GRAY,
Attorneys for Defendant in Error.